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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JEFFREY LLOYD and LAWRENCE KAUFMANN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

J.P. MORGAN CHASE & CO. and CHASE INVESTMENT SERVICES CORP.,

Defendants.

No. 11 Civ. 9305 (LTS)

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND DISMISS OR, ALTERNATIVELY, TO STAY CERTAIN PLAINTIFFS' CLAIMS

Plaintiffs respectfully submit this response to Defendants' Notice of Supplemental Authority, ECF No. 104, notifying the Court of the Third Circuit's decision in *NLRB v. New Vista Nursing & Rehab.*, Nos. 11 Civ. 3440, 12 Civ. 1027, 12 Civ. 1936, --- F.3d ---, 2013 WL 2099742 (3d Cir. May. 16, 2013) ("*New Vista*"). The decision in *New Vista* is both incorrectly reasoned and has no impact on this case.

Like *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cited by Defendants in their reply to their motion to compel arbitration of the claims of several opt-in Plaintiffs, ECF No. 85 at 9, the Third Circuit's conclusion that Board Member Becker's intrasession appointment to the NLRB was invalid is contradicted by several other circuits which have held that intrasession

recess appointments are valid. *See Overstreet ex rel. N.L.R.B. v. SFTC, LLC*, No. 13 Civ. 0165, 2013 WL 1909154, at *3 (D.N.M. May 9, 2013) (explaining that "[t]he *Noel Canning* decision is in conflict with decisions of other circuit courts, which have concluded that intrasession recess appointments to vacancies that arise prior to the recess comply with the Recess Appointments Clause," and collecting cases). As stated by the dissent in *New Vista*, "[t]he Majority's rationale undoes an appointments process that has successfully operated within our separation of powers regime for over 220 years." *New Vista*, 2013 WL 2099742, at *30 (Greenaway, Jr., J., dissenting). Contrary to *New Vista* and *Noel Canning*, both the text of the Recess Appointments Clause and its history make no distinction between intersession and intrasession recess appointments. *See Evans v. Stephens*, 387 F.3d 1220, 1225-26 (11th Cir. 2004) ("[t]welve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate"). Notably, the NLRB recently filed a petition for certiorari with the Supreme Court requesting review of *Noel Canning*. *N.L.R.B. v. Noel Canning*, No. 12-1281 (U.S. Apr. 25, 2013).

In addition, the decision in *New Vista*--issued by a court outside this circuit--is not binding on this Court, and makes no reference to *D.R. Horton,* 357 NLRB No. 184 (Jan. 3, 2012). The court in *New Vista* concluded, in considering a petition for review of an entirely different NLRB decision, that the decision must be vacated because it found that Board Member Becker's appointment was invalid. *Id.*, 2013 WL 2099742, at *29. Even if the decision had any bearing on the validity of *D.R. Horton*, this Court need not rely on *D.R. Horton* to find that the Binding Arbitration Agreement violates the NLRA, as the NLRB has long held that the right to participate in class and collective actions is protected by Section 7. *See* Pls.' Mem. of Law in Opp. to Defs.' Mot. to Compel, ECF No. 78, at 10-11. Defendants' further contention that the

Board is currently "acting without power and without jurisdiction," Defs.' Notice at 2 n.1, is wholly unsupported. As Plaintiffs noted in their Opposition to Defendants' Motion to Compel Arbitration, the NLRB continues to operate as usual. *See* Pls. Mem. of Law in Opp. to Defs.' Mot. to Compel, ECF No. 78, at 15 n.8.

Dated: May 24, 2013

New York, New York

Respectfully submitted,

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